ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAINT XAVIER UNIVERSITY, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent. SAINT XAVIER UNIVERSITY ADJUNCT FACULTY ORGANIZATION, IEA-NEA, Intervenor	No. 18-1076 (Consolidated with 18-1086)

PETITIONER'S REPLY TO NLRB'S AND UNION'S OPPOSITION TO MOTION TO HOLD IN ABEYANCE

The National Labor Relations Board (the "Board") and the Saint Xavier University Adjunct Faculty Organization, IEA-NEA ("Union") have filed memoranda opposing Petitioner Saint Xavier University's ("SXU") motion to hold this case in abeyance pending the Court's decision in *Duquesne University v. NLRB*, No. 18-1063. But they do not dispute that this case is for purposes of the motion in the identical posture as *Manhattan College v. NLRB*, No. 18-1113, which this Court held in abeyance on its own initiative. And they do not dispute that to deny the motion would result in briefs that will largely repeat (other than the facts) what the parties will have already told the Court in the *Duquesne University* case. Instead, taking the oppositions together, they offer just two reasons why the

Court should require this case to proceed: (1) to avoid further delay in this case, and (2) because briefing this case would supposedly help the Court efficiently and effectively resolve these cases. As explained below, neither argument is persuasive, and the Court should grant the motion to hold in abeyance.

1. The Board—and only the Board—contends that the Court should deny the motion to avoid further delay in this case. The Board suggests that SXU—which is a small, nonprofit Catholic institution serving principally minority students—somehow obtained a benefit by invoking the Board's processes to challenge its jurisdiction and would benefit from further delay. This argument fails for at least three reasons.

a. First, SXU's motion asks the Court to hold this case in abeyance only for the time it will take the Court to decide the *Duquesne* case. While this will postpone the *briefing* in this case, there is no reason to believe that it will lead to any significant delay in the Court *resolving* this case. This is true regardless of the outcome of *Duquesne*. Holding the case in abeyance will result in no material delay at all if the outcome of *Duquesne* ultimately controls the outcome here, as we believe likely. But even if the Court in *Duquesne* leaves further issues open for resolution, requiring the parties to go forward with briefing now is not going to avoid future delay, because it is unlikely that this case would

be decided before *Duquesne* in any event, and the panel hearing this case would likely ask for supplemental briefing to address the impact of the *Duquesne* decision.

b. Second, this case has been pending since 2011. For the Board to worry now about the potential for incremental delay is absurd, particularly since both the Board and the Union bear significant responsibility for the seven years that have already gone by since this case was initiated. This case sat fully briefed before the Board during the representation stage (N.L.R.B. Case No. 13-RC-022025[1]) for more than four and a half years, and for another five months at the unfair labor practice stage (Case No. 13-CA-204564[2]). Moreover, in the *Duquesne* case, the Board has already sought and received a seven-week extension to file its principal brief in this Court, seemingly entirely unconcerned about the delay on its part. For its part, the Union won the representation case against SXU on September 29, 2016, and for no apparent reason waited about eight months after that to demand that the University bargain. After that long-delayed demand, the Union filed the August 2017 charge that gave rise to this petition for review. Accordingly, the mere possibility that holding this case in abeyance could result in some additional delay is no reason to require the parties to file and the Court to review briefs in this case that will parrot what the parties already have said and will say in *Duquesne.*

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1 *See* https://nlrb.gov/case/13-RC-022025.

2 *See* https://nlrb.gov/case/13-CA-204564.

c. The Board is also dead wrong to suggest that SXU somehow caused the delay in these cases or has benefitted from invoking the Board's representation case procedures. *See* Board's Opp'n, ¶ 5(a). All SXU has done is assert that under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Board has no jurisdiction over a unit of adjunct faculty. There is no dispute that under the simple, three-part test this Court adopted in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), *Catholic Bishop* applies here and the Board has no jurisdiction over SXU's faculty. *See* ¶ 2, *infra*. But because the Board refuses to accept that test, it forced this small non-profit university to litigate not one, but two representation case administrative hearings, with all the related briefing to the Regional Director and the Board. *See* N.L.R.B. Case No. 13-RC-022025.[3] It is the Board that has unnecessarily put SXU through the ringer for seven years, not the other way around.

2. For similar reasons, the Board and the Union are wrong to suggest that requiring the parties to file briefs in this case that will largely repeat—but for the factual nuances—what the parties will say in *Duquesne* will somehow help the Court to decide the fundamental legal issue or result in efficiencies.

a. The fundamental legal question in *Duquesne*, *Manhattan College* and this case is whether the Board has jurisdiction under *Catholic Bishop*.

[3] *See* https://nlrb.gov/case/13-RC-022025.

In *University of Great Falls v. NLRB*, this Court made clear that it owes no deference to the Board's interpretation of *Catholic Bishop*. *See* 278 F.3d at 1341 (this Court is "governed by the Supreme Court's decision in *Catholic Bishop* as [it] read[s] it, not as it is read by the Board"). And based on this Court's reading of *Catholic Bishop*, this Court set out in *Great Falls* and has reaffirmed in *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009), a simple, three-part test that when satisfied puts a unit "patently beyond the NLRB's jurisdiction." 558 F.3d at 574. Nothing in the Board's recent *Pacific Lutheran University* decision could or did change that precedent, which remains the law of the Circuit. Contrary to the Union's assertion that the Board adopted its test in *Pacific Lutheran* "in order to comply" with this Court's decision in *Great Falls*, *see* Union Opp. at 2, in fact the Board in *Pacific Lutheran* explicitly refused to follow *Great Falls*, arguing that it "overreaches" and ignores federal labor policy. 361 NLRB at 1407–08. There is no real dispute that all three universities satisfy this Court's test. The factual differences between Duquesne and Saint Xavier will therefore add little; this Court need only apply the settled law of the Circuit.

b. What is more, the underlying facts in the *Duquesne* case and this case are quite similar.[4] And the Board applied its *Pacific Lutheran* test the

[4] *Compare* Regional Director's Decision at 5 (June 5, 2015), *Duquesne Univ.*, No. 06-RC-080933, *available at* https://nlrb.gov/case/06-RC-080933 ("[T]he record reveals that these chairs [who hire adjunct faculty] attend hiring seminars in

same way in both cases, using the same basic reasoning: only faculty in the universities' theology and/or religious studies departments perform what the Board deems a sufficiently religious function for *Catholic Bishop* to apply. *See* Decision on Review & Order (April 10, 2017), *Duquesne Univ.*, No. 06-RC-080933[5]; *Saint Xavier University*, 364 NLRB No. 85 (2016). Accordingly, the Court will not gain much, if anything, if it requires briefing in this case. And even if the Court were to somehow conclude that the Board permissibly adopted *Pacific Lutheran* standard, the resolution of the *Duquesne* case will almost certainly narrow and focus the issues in this case. It is simply not efficient for the parties or the Court to require largely repetitive briefing and argument now, when holding the case in abeyance will likely make all or a significant portion of that briefing and argument unnecessary.

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which . . . the Employer's expectations related to hiring are communicated to them . . . ."), *and id.* at 10 ("The Provost testified that faculty could not be 'hostile' to the Employer's mission and, if such a person was brought to his attention, he would take disciplinary action, such that, for example, the adjunct's contract would not be renewed."), *with* Regional Director's Supplemental Decision at 7 (June 15, 2015), *Saint Xavier Univ.*, No. 13-RC-022025, *available at* https://nlrb.gov/case/13-RC-022025 ("The University's Provost testified in 2015 that he instructs deans and department chairs to make sure adjunct candidates are 'made aware of the mission identity issue and that they are able to support that in their teaching primarily.'"), and *id.* at 8 ("[T]here was testimony that there would be negative consequences for faculty, including adjuncts, who 'demean' or 'denigrate' the Catholic faith.").

[5] *Available at* https://nlrb.gov/case/06-RC-080933.

For the foregoing reasons, the Court should grant the University's motion to hold in abeyance.

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New York, NY

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2018, I filed the foregoing Petitioner Saint Xavier University's Reply to NLRB and Union's Oppositions to Motion to Hold in Abeyance through the Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ *Stanley J. Brown*
Stanley J. Brown

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